IN THE IOWA DISTRICT COURT FOR MARION COUNTY

BILLY DEAN CARTER, BILL G. CARTER and ESTATE OF SHIRLEY D. CARTER by and through BILL G. CARTER, Executor, Plaintiff/Respondent, v. JASON CARTER, Defendant/Petitioner.	Case No. LACV 095809 **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S SECOND AMENDED PETITION FOR RELIEF**

The Plaintiffs, the Estate of Shirley D. Carter, by and through Bill G. Carter, Bill G. Carter individually, and Billy D. Carter, submit this memorandum of law in opposition to Defendant's Second Amended Petition for Relief ("Petition").

INTRODUCTION

One year ago, after a hard-fought and well-tried two-week trial, a jury of this county relatively quickly and thus resoundingly determined that Jason Carter intentionally shot and killed his mother in the kitchen of the home where she and her husband raised him. On December 10–12, 2018, the Defendant presented to this Court his purported newly discovered evidence in an attempt to upset the jury's verdict. By the settled law applicable to such motions, and under any common sense view of the sanctity and finality of jury verdicts, the Defendant's presentation was an utter and unexciting failure. This Court need dwell little on the Defendant's presentation before denying the Petition and making its judgment final.

Mindful of this Court's request at the conclusion of the hearing, the Plaintiffs will devote the bulk of this memorandum to setting forth the law applicable to the Petition. The Plaintiffs will defer to the Court's recollection of the details of the facts presented at the hearing and will only lightly work to apply the law here to those facts.

ARGUMENT

I. THE DEFENDANT IS NOT ENTITLED TO RELIEF UNDER RULE 1.1012.

The Petition seeks relief based on Iowa R. Civ. P. 1.1012, which permits a court to "correct, vacate or modify a final judgment or order, or grant a new trial on any of" six different grounds. From an inspection of the Defendant's papers, only one of the grounds under Rule 1.1012 is asserted here: "Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial..." Iowa R. Civ. P. 1.1012(6). *See generally* Petition; Brief in Support of Petition for Relief and Motion to Vacate Judgment or, in the Alternative, for a New Trial (filed October 18, 2018) ("Brief").[1]

The legal standard by which the Petition is judged is not controversial:

> A party seeking a new trial on such grounds [newly discovered material evidence] must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will *probably change the result* if a new trial is granted.

Benson v. Richardson, 537 N.W.2d 748, 762 (Iowa 1995) (citing *In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986))(emphasis supplied). Despite equivocation on this point during the hearing, the Defendant agreed in writing that this is the law. *See* Brief at 6–7 (reciting the three-element test

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[1] The Defendant seeks vacation of the judgment against him or a new trial as alternative forms of relief without explaining what circumstances would entitle him to one form of relief or the other. *See* Petition at 10, Brief at 53. Because it is so plain that the Defendant is not entitled to any relief as a substantive matter, the Plaintiffs will not consume the Court's time with a procedural discussion of the proper remedy. Suffice it to say that most of the law in this area discusses motions for new trial for the logical reason that a defect in the original trial means at most that the trial should be repeated, not that the Defendant wins once and for all without needing to prove his entitlement to that victory.

and citing *D.W.* and *Benson*). The Plaintiffs will elucidate each of the three elements, and explain their fatality to the Petition, in turn.

A. The Plaintiffs Did Not Act With Proper Diligence.

Evidence that the Defendant did not present at trial does not help him now if "in the exercise of due diligence" that evidence could "have been discovered prior to the conclusion of the trial." *Benson*, 537 N.W.2d at 762. It is not enough that the Defendant show that he did not possess the evidence in question. Rather, he must show that he lacked even a reasonable lead that could have been followed to find the evidence. This is demonstrated persuasively in *Mays v. C. Mac Chambers Co., Inc.*, 490 N.W.2d 800, 804–05 (Iowa 1992). In that case the appellant contended that a witness's testimony constituted newly discovered evidence where the appellant knew of the existence of the witness, but the witness lied about her knowledge in order to avoid having to testify at trial. The Iowa Supreme Court, vacating a contrary result from the Court of Appeals, held that notwithstanding the witness's deception, the appellant knew enough about the witness to be on notice that further investigation before the trial was warranted, and the appellant thus was not entitled to a new trial now.

Two independent reasons show a lack of diligence by the Defendant here. First, the entirety of the evidence upon which the Defendant grounds his Petition comes from the State's investigation of Shirley Carter's murder. Yet the Defendant did everything he could, including an interlocutory appeal to the Iowa Supreme Court, to bar the parties from having *any* access to the State's criminal investigative file. The Defendant cannot reverse course and claim there was too little discovery of that file now when he claimed there was too much before.

Second, more than one item of evidence shows that the principal suspects proposed by the Defendant now, the Followill brothers, were known to the Defendant (at his civil deposition, Exhibit D6) and his attorneys (in a recorded conversation with Marion County Detective Kious,

Exhibit C6). While the knowledge of the attorneys was shown to exist shortly before trial, the test for whether evidence is "newly discovered" is whether the evidence had "been discovered prior to the *conclusion of the trial*," not reasonably in advance of the trial. *Benson*, 537 N.W.2d at 762.

B. The Evidence Proffered by the Defendant Fails the Materiality Element.

In order to be "material," the newly discovered evidence must be *admissible*. No matter how "newly discovered" evidence may be, if the jury at a new trial would never hear that information under the Rules of Evidence, that information cannot possibly change the outcome of the trial. The cases reflect this. "It is, of course, well settled, and in fact it is elemental, that newly discovered evidence which will form the basis for a new trial must be such evidence as would be competent and admissible on such trial." *Nichols-Shepherd Co. v. Ringler*, 120 N.W. 640, 640 (Iowa 1909). *See also Frazier v. Burlington Northern Santa Fe Corp.*, 811 N.W.2d 618, 631 (Minn. 2012) ("[T]o warrant a new trial the newly discovered evidence must be relevant and admissible."); *United States v. Intel. Brotherhood of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001) (for party to obtain relief from judgment based on newly discovered evidence, "the evidence must be admissible"); *Edwards v. Edwards*, 418 S.W.3d 757, 759 (Tex. App. 2013) (to warrant new trial, the "newly discovered evidence must also be competent and admissible").

The vast majority of the evidence offered by the Defendant was plainly inadmissible, however. Most of the evidence was hearsay, usually at more than one level. To begin with, the evidence consisted of law enforcement officers either reciting out-of-court statements that had been made to them for the truth of the matters asserted, or introducing their investigative reports containing such statements. The statements were plainly hearsay. *See* Iowa R. Evid. 5.801(c),

5.802. *See also* Iowa R. Evid 5.803(8)(B)(i) (investigative reports by police and other law enforcement personnel are not within the public records exception to hearsay rule).

Beyond that first level of hearsay, the vast majority of the evidence proffered consisted of additional levels of hearsay. That is, the witnesses whose out-of-court statements were being proffered did not witness Shirley Carter's murder or facts proving the identity of the killer themselves; rather, they were quoting what other people said about that murder. That additional level of hearsay defeats the admissibility of the evidence. *See* Iowa R. Evid 5.805 (hearsay within hearsay is inadmissible unless a hearsay exception applies to every level of the hearsay).

To these statements, at least, the Defendant offered a couple of justifications. First, he contended that they were statements against interest. Statements against interest are only exceptions to the hearsay rule, however, if the witness was unavailable to testify at the hearing. That showing was not even attempted for a single one of the hearsay declarants at the hearing. *See* Iowa R. Evid. 5.804; *State v. Traywick*, 468 N.W.2d 452, 454–55 (Iowa 1991) (upholding exclusion of hearsay notwithstanding alleged statement against interest where proponent failed to produce "proof that the declarant… was unavailable as a witness").

The Defendant also argued that the statements would be admissible because they would be inconsistent with what the witnesses—people allegedly complicit in Shirley Carter's murder—would likely say at trial. But the Defendant made no evidentiary showing, even at the level of an offer of proof, of what those witnesses would in fact say at trial. And it doesn't matter. The law in Iowa clearly prevents the Defendant from calling a witness at trial, having that witness deny the content of a prior statement, and then "impeaching" that witness with the prior statement that is plainly hearsay but also the thing the Defendant really wants the jury to hear. *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990) (A party "is not entitled under Rule

607 to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible. To permit such bootstrapping frustrates the intended application of the exclusionary rules which rendered such evidence inadmissible on the [proponent's] case in chief."); *State v. Bush*, 791 N.W.2d 710 (Table), 2010 WL 448 4401, at *4 (Iowa Ct. App. 2010) (reversing criminal conviction based on violation of *Turecek* rule).

Apart from problems with admissibility, the evidence proffered by the Defendant does not satisfy the materiality element of the newly discovered evidence rule for two other reasons. First, the little bit of admissible evidence proffered by the Defendant was merely impeaching or cumulative. *See Benson*, 537 N.W.2d at 762 (evidence does not support new trial if it is "merely cumulative or impeaching"). For example, evidence about whether and how Jason Carter placed fingerprints on either the gun safe from his parents' house or the property inventory prepared by law enforcement does not contradict the fundamental reason for the admission of the fingerprint evidence: to show that Jason lied at material points in the investigation. At best, the new evidence admitted on that issue impeaches the conclusion the jury drew from that evidence, but it does not contradict that conclusion. Likewise, tape recordings from Bill Carter regarding the condition of Shirley Carter's body or Curt Seddon regarding what Jason said about bullet holes in the house are merely impeaching of those witnesses' testimony on those topics at trial; they are not independent material evidence undermining the verdict.

Second, the vast majority of the Defendant's evidence was proffered in support of a theory that is different from the defense theory at trial. As the Court well remembers, the defense theory at trial was that Bill Carter killed his wife. The evidence proffered at the hearing is entirely, or almost entirely, in aid of the proposition that some stranger burglars—likely the

Followill brothers—committed the murder instead. The law does not, however, award a new trial based on newly discovered evidence that supports a different defense theory. *State v. Smith*, 573 N.W.2d 14 (Iowa 1997), is instructive. In *Smith*, a criminal defendant sought a new trial on charges of assault with intent to inflict serious injury and terrorism. The fighting issue at trial was whether he fired a gun at others in a public park. The defendant alleged that he had newly discovered evidence in the form of witnesses who said that they did not see the defendant at the park at the time of the shooting. The Supreme Court affirmed the district court's denial of the defendant's request for a new trial, among other reasons, on the basis that the alleged newly discovered witnesses testified inconsistently with the defendant's defense at trial, which was that he *was* present at the park during the shooting but did not fire a gun. *Id.* at 21–22. Here, the Defendant's change in theory is even more stark than the change that was rejected in *Smith*, and the result is the same: Newly discovered evidence is out-of-bounds if it is in support of a different theory than the trial defense.

C. The Defendant's Proffered Evidence Would Not Probably Change the Trial Outcome.

As noted above, both parties have agreed that the elements governing the claim in the Petition require a showing that "the evidence will probably change the result if a new trial is granted." *Benson*, 537 N.W.2d at 762; Brief at 6 (Iowa R. Civ. P. 1.1012 "requires the movant to show… the [newly discovered] evidence will probably change the result if a new trial is granted") (citing *In re D.W.*, 385 N.W.2d at 583). Nonetheless, the Defendant in his next breath waffles about the "probably change the result" standard by citing a 97-year-old case, *Henderson v. Edwards*, 183 N.W. 583, 584 (Iowa 1921), for the proposition that a motion for new trial should be sustained when the newly discovered evidence, "considered with the evidence presented on the trial, might cause a jury to take the other view." In light of the recent Iowa

Supreme Court authority from both parties, however, it is plain that *Henderson* is simply no longer good law on this point.[2]

In deciding whether the newly discovered evidence would probably change the outcome of the trial, this Court does not accept the new evidence uncritically. Rather, it must evaluate the credibility of that evidence. As the Seventh Circuit has stated:

> First, our most recent decisions regarding [new trial] motions are clear that the new evidence must be credible to warrant a new trial.... Second it is only logical that a district court weigh the credibility of evidence before granting or denying a [new trial] motion. [New trial] motions are decided by judges; not by juries. Credibility determinations are necessary to these decisions. To hold otherwise would mean that the district court would have to order a new trial no matter how incredible the new evidence.

Daniels v. Pipefitters' Assoc. Local Union No. 597, 98 F.2d 800, 803 (7th Cir. 1993) (citations omitted). *See also Crespin v. Largo Corp.*, 698 P.2d 826, 828 (Colo. App. 1984) ("In order for newly discovered evidence to serve as a basis for granting a new trial, it must be credible.") (citing authority).

Once again mindful of this Court's direction, we will not discuss the evidence here in detail. But it is plain that when weighed against these standards, the evidence proffered by the Defendant does not come within a country mile of credibly suggesting that the jury probably

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[2] The Defendant further muddies the water by citing *Mulkins v. Bd. of Supervisors of Page Cty.*, 330 N.W.2d 258 (1983), for the proposition that a judgment may be set aside if "[t]here has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust." *Id.* at 262 (quoting Restatement (2d) of Judgments §73 (1982)). *Mulkins*, and the Restatement section on which it relies, deal with the entirely different situation in which a party, after a judgment (typically equitable), changes the circumstances on which the judgment was based. In *Mulkins*, a county was forced on mandamus to rebuild a bridge at the behest of plaintiffs who made use of the bridge, and the county obviated the judgment by declaring the road containing the bridge abandoned. This was considered newly discovered evidence. It has nothing whatsoever to do with this case.

would have reached a different decision having heard that little evidence that is actually admissible. The Defendant's claim under Rule 1.1012 fails.

II. THE DEFENDANT'S ARGUMENT ABOUT A DISCOVERY VIOLATION GOES NOWHERE.

Although it is not discussed in the Defendant's Brief, the Defendant's attorneys at the hearing suggested at various points that the Defendant was entitled to a new trial based upon a failure by the Plaintiffs to produce discovery in advance of the trial. That suggestion, to the extent it can be considered a formal ground for relief based on the oral arguments at the hearing, is easily brushed aside.

First, the Defendant never pleaded a discovery violation as a basis for relief. Iowa R.Civ.P. 1.1013 specifies the procedure governing this matter, and it required the Defendant to prepare and file a petition that set forth his grounds for relief. Neither the Petition nor the Brief filed most recently in advance of this hearing raises any discovery issue.

Second, a new trial and/or vacation of a judgment following a trial are not a proper remedy for a pretrial discovery violation. The Petition is based solely on Iowa R.Civ.P. 1.1012. There is no ground for relief in that rule relating to discovery violations, and the Defendant has cited no law to this Court suggesting otherwise. Indeed, when the Defendant cited authority purporting to support his discovery argument as a ground for relief at one point during the hearing, that authority served only to undermine his position. To wit, the Defendant cited *Whitley v. C.R. Pharmacy Service, Inc.*, 816 N.W.2d 378 (Iowa 2012); *Kendall/Hunt Publishing Co. v. Rowe*, 424 N.W.2d 235 (Iowa 2005); and *Suckow v. Boone State Bank & Trust, Co.*, 314 N.W.2d 421 (Iowa 1982). None of those cases involved a post-trial request to the district court for a new trial based on a discovery violation. None of those cases involved a post-trial claim regarding newly discovered evidence. And in all three cases, the party complaining of the

discovery violation and claiming an entitlement to relief *lost* on that claim in the Iowa Supreme Court.

Third, the Defendant produced no proof at the hearing that he did not receive discovery that he should have had. He identified no item of evidence that the Plaintiffs possessed but did not produce. It is undisputed that before the civil trial, whatever evidence was made available from the criminal investigation by the Iowa Division of Criminal Investigation or the Marion County Sheriff's Office was shared between the parties on a timely basis. Likewise, whatever law enforcement withheld from the Defendant was also withheld from the Plaintiffs. The only inequality in production of evidence is the one that exists now, where the Defendant has the entirety of the state's criminal investigation file, and the Plaintiffs do not.[3]

CONCLUSION

In *Mays*, 490 N.W.2d at 804, the Iowa Supreme Court said, "[w]e do not favor motions for new trial based on newly discovered evidence, *Interest of D.W.*, 385 N.W.2d at 583, primarily because '[t]here must be repose to litigation.' *Yoder* [*v. Iowa Power & Light Co.*], 215 N.W.2d [328] at 335 [(Iowa 1974)]. With these principles in mind, we now lay this case to rest."

This Court should do the same.

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[3] The Defendant makes reference to an article in the Washington Post in which one of the undersigned attorneys is quoted as stating that the alleged newly discovered evidence proffered by the Defendant contained nothing new that was of substance. The key caveat in that statement was "of substance." The Plaintiffs' attorneys were not then, or now, required to credit any rumor about who may have killed Shirley Carter. The Washington Post's quotation notwithstanding, the Defendant has yet to identify any item of evidence or information that the Plaintiffs possessed that they did not share in discovery.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on December 28 2018 by

- ☐ U.S. Mail
- ☐ FAX
- ☐ Hand Delivered
- ☐ Electronic Mail
- ☐ FedEx/ Overnight Carrier
- X CM/ECF

Attorneys of Record

Signature: /s/ Michele Baldus